No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association, T. M. DELANEY, individually and as General Chairman, LEO HOLZACHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairmen,

Defendants-Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington corporation, OREGON TRUNK RAILWAY, a Washington Corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation,

Plaintiffs-Appellees.

Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEES, SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY ET AL.

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SUBJECT INDEX

INDEX OF AUTHORITIES

Page

Cases Cited

TABLE OF AUTHORITIES (Cont.)

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JURISDICTIONAL STATEMENT

Insofar as the appellants' brief states that this court has jurisdiction of the appeal on the basis of Section 28 U.S.C. 1292(1) as amended (Act of September 2, 1958, P.L. 85-919, 72 Stat. 1770), appellees concur. The bal-

ance of the jurisdictional statement in that brief seems incongruous to its subject. Subsequent to the issuance of a temporary restraining order against a threatened strike by appellants (R. 116) the court below after hearing entered Findings of Fact and Conclusions of Law and thereupon granted the application of appellees for the temporary injunction from which appellants have taken this appeal.

STATEMENT OF THE CASE

(Though appellants and appelles are both named in the plural, we will hereafter, as have appellants, treat them as one on each side.)

Because appellee is unable to agree with substantial portions of the statements either made in or omitted from appellant's Statement of the Case, we think it desirable to restate the facts, based upon the Findings of Fact entered by the court below. For the court's convenience we reproduce those findings in Appendix I of this brief.

We find no fault with appellant's description of the Order of Railway Conductors and Brakemen as a labor organization or of appellee as a carrier and employer, both subject to the provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) as amended, hereafter called the "Act."

The court is well aware, and could take judicial notice, of the dispute which arose between virtually all of the nation's major rail carriers, of which appellee was one, and the five "operating brotherhoods," of which

appellant was one, arising out of identical formal notices of proposed rule changes served on the five brotherhoods by the carriers in November of 1959 and on the carriers by the five brotherhoods in September of 1960,[1] pursuant to Section 6 of the Railway Labor Act. The sum of these proposals, particularly those of the carriers, would have completely revised the rules and practices of many decades concerning (1) the manning of engines, (2) the "consist" of train crews behind the engines, and (3) a host of other rules and practices concerning working conditions and rates and bases of compensation.

The disputes these formal notices and counternotices created between the carriers and five brotherhoods were national in scope and from the beginning were handled by each side on a national basis. The first two of the three major categories into which these disputes fell were eventually resolved by the enactment by the Congress of Public Law 88-108 (79 Stat. 129, Act of August 28, 1963) and the resulting award of Board No. 282, relating to the removal of firemen on diesel engines, and procedures for changing the number of men in train crews in freight and yard service.

There remained, however, a myriad of issues still in dispute, known collectively as the "unresolved work rules." These were finally disposed of at the insistence of President Johnson by an agreement generally known as

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[1] Cf. pp. 287 et seq., 294 et seq., "Report of the Presidential Railroad Commission" February 1962 (Exhibit 3 offered in evidence at the July 3 hearing and admitted for a limited purpose, Transcript of Proceedings, pp. 77, 78, by stipulation made a part of Transcript on Appeal but in printed, not photocopied, form). For an excellent history of the disputes, see *C.R.I. & P. Railroad* v. *Hardin,* 239 F. Supp. 1, at pp. 9-13, inclusive.

the "White House Agreement" because its basic outline was agreed to on a national basis at the White House, though the written and more detailed form was actually worked out and signed in Chicago, Illinois.. That agreement is dated June 25, 1964 (R. 104). It is this "White House Agreement"—or rather one part of it—which is involved in this dispute and the temporary injunction this court is asked to review. That part of the White House Agreement with which we are here concerned is known as the "Allowances Away From Home" issue, and on this "property" (appellee's railway system) as on many others in the nation, springs from a long history of practices in freight service in the railway industry.

In the collective bargaining agreement, or "schedule," between appellee and appellant there is (R. 103) an Appendix "E," dated July 14, 1952, relating to the "pooling of cabooses." That agreement, Paragraph (c) (1), (Article 7), reads:

> "(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman of such intention, specifying the territory and service involved, whereupon the carrier and employee representatives shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the caboose and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses."

That agreement, which was part of a national agreement between many carriers, including appellee, and appellant was followed by appellee's decision to "pool cabooses."

So on April 10, 1958, appellee and appellant entered into an agreement that (R. 103):

"4. When trainmen in pool and unassigned freight service are provided with pooled cabooses, their basic rate will be increased one cent (1c) per mile in addition to the established basic through freight rate. This to apply to mileage claimed and paid for as per time slip.

"It is understood that the one cent (1c) per mile applicable to pool and unassigned freight service will also apply to pool and unassigned freight crews when required to perform unassigned way freight, or paid the way freight rate under the Conversion Rule, or when required to perform unassigned work train or unassigned snow service, in addition to the existing rates applicable to such service.

"5. Train crews to whom this agreement is applicable, if tied up between terminals where there are no accommodations to eat or sleep, will be paid continuous time at the pro rata rate while so tied up.

"6. This agreement is without prejudice or precedent to any other practice heretofore recognized and agreed upon by the Carrier and the Organization, but supersedes any conflict arising therefrom."

The background of this subject is too well known in railroad history, particularly in the West, to want explanation here even if the language of these agreements were not self-exploratory. In the earlier days the conductor and crew were often held away from their home terminal for many hours, awaiting return to it. The ca-

boose was their "home away from home," and was known as a part of the conductor's emoluments. But as times changed, and the caboose became part of the train, i.e., "pooled," rather than being cut off with the conductor and crew, the conductor and train crew dependent on the caboose when tied up away from terminal received monetary allowance in lieu of their caboose "home."[2]

Enlargement of, or change in, the "pooled caboose allowance" was one of the "unresolved work rules" issues involved in the June 25, 1964, "White House Agreement," and is found in Article II, Section 1 of that agreement, which provides:

"ARTICLE II—EXPENSES AWAY FROM HOME:

"Section 1—

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. *Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis.* The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

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[2] Cf. Report of the Presidential Railroad Commission pp. 151-153 inclusive.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement." (Emphasis supplied.)

Three conferences were held between appellee and appellant's representatives (R. 105) in an attempt to agree on what would be considered "suitable lodging or an equitable allowance in lieu thereof" and the resulting cancellation of the "pooled caboose allowance." These conferences proving unavailing in resolving the issue, and the 30-day period the last paragraph of the above-quoted agreement prescribed being spent, appellee on July 24, 1964, cut the Gordian knot by issuing Circular #65 (R. 105, 106), its version of the application of the White House Agreement on the issue. No termination of negotiations was involved in the Circular. Appellant thereupon, on August 3, 1964, served on appellee its version of what was "suitable lodging or an equitable allowance in lieu thereof" (R. 106, 107).

Thereafter a conference was held between appellant and appellee on the issues created by these conflicting versions of what constituted "suitable lodging or an equitable allowance in lieu thereof," and the pooled caboose allowance cancellation, and on September 15, 1964, they reached and signed a letter agreement (R.

110) which restored the *status quo* as of July 24, 1964, the day before the Circular became effective, and the strike threat hereafter referred to (p. 20 of this brief) was withdrawn. (Since this agreement was signed by N. S. Westergard, Vice President and General Manager, appellee is somewhat puzzled by appellant's statement on page 15 of its brief that this dispute was not handled up to and including the "Chief Operating Officer.")

On January 27, 1965, still another conference was held between appellant and appellee in an attempt to resolve their differences over the pooled caboose allowance and the substitution of suitable lodging or an equitable allowance in lieu thereof in its place. (Agreement on suitable lodging or an equitable allowance in lieu thereof had been reached between appellee and the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen two months earlier (R. 113).) That effort proved unavailing and the letter agreement of September 15, 1964, is still by its terms in effect, so remaining until the parties "* * * mutually agree otherwise * * *."

Apparently seeking consistency with the portion of its letter of August 3, 1964 (R. 106), that appellant conceived its version of suitable lodging or an equitable allowance in lieu thereof to be a "Section 6" notice under the Act, appellant sought to invoke the mediatory procedures of the National Mediation Board (R. 108), and that Board requested a statement from appellee as to its position. On the following day appellee wrote the Secretary of that Board stating its position (R. 108, 109) that the dispute was one over the application of

Article II, Section 1, of the White House Agreement of June 25, 1964, a position consistent with that stated in writing to appellant by appellee in a letter dated August 3, 1964 (R. 107, 108). Again, on November 12, 1964, appellant sought the services of the National Mediation Board (R. 110), and in response to that body's request for its position appellee again stated to its Secretary that the pending dispute was over the application of Article II, Section 1—Expenses Away From Home—of the June 25, 1964, White House Agreement and that therefore the Mediation Board had no place in it (R. 111, 112). The National Mediation Board has not interjected itself into this dispute at any time.

Nothing further was heard from appellant after the January 27, 1965, conference between the parties, nor from the Mediation Board after its telegram of November 12, 1964 (respectively R. 113, R. 110), until the National Mediation Board's telegram to appellee dated June 2, 1965 (R. 113), advising appellee of the appellant's intent to "withdraw from service" on June 7, 1965, which led up to the initiation of the proceeding below. The strike notice has never been withdrawn and is therefore still in effect (R. 114, 115).

Immediately upon being advised of the appellant's threat to "withdraw from service"—strike—on June 7, 1965, appellee submitted the dispute to Special Board of Adjustment No. 434, which had previously been established by the parties pursuant to Section 3, Second, of the Act (R. 45-47). Subsequently, on July 3, 1965, the dispute was likewise submitted to the National Railroad Adjustment Board, First Division (R. 114).

At the time of the entry of the temporary injunction here appealed from and at all times since, the dispute has therefore been before both Special Board of Adjustment No. 434 and the National Railroad Adjustment Board, First Division, for determination by one or the other as provided for in Section 3 of the Act.

ARGUMENT

I

Appellant's failure to comply with the provisions of Rule 18(2)(d) of the Rules of this Court (28 U.S.C.A. 1964, Pocket Part p. 107) by specifying wherein the District Court's findings of fact are alleged to be erroneous limits the examination of those findings by this Court to the issue of whether the findings support the conclusions of law and the temporary injunction granted thereon.

Appellant has not set forth anywhere in its brief the Findings of Fact and Conclusions of Law of the court below. It has mentioned (Appellant's brief p. 6) that "extensive" findings were made and in its eighth specification of error makes a page reference to the Transcript of Record which on examination proves to be the last of two sentences in Finding of Fact Number IV (R. 102, 103) but then argues its own legal conclusion of the meaning of the June 25, 1964, agreement. Appellant did not at any time object to the entry of any of the Findings made by the court below or proffer its version of what the District Court should have found

in the light of the admitted pleadings and the exhibits offered by both sides.

Appellant's brief is actually an attempt to retry *de novo* in this Court the case heard and decided by the District Court. It is just such attempts as this which are, we believe, intended to be precluded by Rule 18(2)(d) which in the part here involved reads that

> "* * * In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. * * *."

This Court has consistently held that errors which are not specified in accordance with the provisions of Rule 18 need not be considered on appeal. *Navel* v. *United States,* 278 F.2d 611 (9th Cir. 1960); *Greyhound Corp.* v. *Blakley,* 262 F.2d 401 (9th Cir. 1958); *Thys Company* v. *Anglo California National Bank,* 219 F.2d 131 (9th Cir. 1955). In *Reynolds* v. *Lentz,* 243 F.2d 589 (9th Cir. 1957), this Court stated that it is not required to consider whether findings of fact are erroneous when the appellant's brief contains no specification of error in those findings as required by Rule 18.

Accordingly, the sole issue before this Court on this appeal is whether the Findings of Fact entered below support the District Court's Conclusions of Law, and thereby the temporary injunction which followed. Since the District Court's Findings of Fact unquestionably do support its Conclusions of Law and therefore the temporary injunction, the action of the lower court should be affirmed.

II

Conclusion of Law Number 2 that "The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.) . . ." is inescapable under the uncontested Findings of Fact entered herein.

A. "Major" and "minor" disputes are clearly defined by the Act and judicial decisions.

The only question for decision below was whether appellee's letter "notice" of August 3, 1964 (R. 106, 107) was a notice of

> ". . . an intended *change* in agreement(s) affecting rates of pay, rules, or working conditions, . . ." (Emphasis supplied.)

under Section 6 of the Railway Labor Act as amended (45 U.S.C. § 156), in which event the dispute created was a "major dispute," or whether that letter involved

> ". . . the *interpretation or application* of agreement(s) concerning rates of pay, rules or working conditions, . . ." (Emphasis supplied.)

under Section 3, First (i), of the Act (45 U.S.C. § 153(i)), in which event the dispute created was a "minor dispute."

It would be difficult if not impossible to improve on the lower court's statement of the answer to the question. After reading from that letter's introduction, he said (Tr. 29, 30),[3]

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[3] In this brief the photocopied Transcript of Record is referred to as "R", the Transcript of Proceedings below as "Tr.", and the report of the Presidential Railroad Commission hereafter as "Rept."

"Now, I am not going to read the balance of it. I am just going to conclude that in no place in that letter is there a demand or a request of the plaintiff to change a single word or character of punctuation in the agreement of April 25,[4] 1964. All that letter purports to do is to ask the plaintiff to subscribe to an interpretation of the provisions of Article 2.

"You have stated your position as to what shall constitute suitable lodging. You haven't asked for a change of the language of the contract. So without belaboring it any further, I think that this dispute as it appears from the record before this Court is nothing more or less than an interpretation of what shall be suitable lodging, or what shall be an equitable allowance in lieu thereof."

At the risk of illustrating what to this Court is surely the obvious, we advert to the scheme of the Railway Labor Act with respect to the handling of the two types of dispute which can arise under it.

The first, or "major," type of dispute has already been referred to in a partial quotation from Section 6; the entire context of that section on the point is

"Carriers and representatives of the employees shall give at least thirty days' written notice of an *intended change in agreements* affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten

[4] The "April" before "25, 1964" is either a slip of the trial judge's tongue or an error in the notes of the reporter; the June 25, 1964, White House Agreement was obviously the agreement the trial judge was referring to.

days after the receipt of said notice, . . ." (Emphasis supplied.)

If in conference the parties have not reached agreement on a proposal for a new contract provision or a change in an existing provision, the National Mediation Board may intervene either on its own volition, or the request of either party, or of both parties. It is then the function of that Board, created by and stated in Section 5 of the Act, to seek an agreement between the parties by the process of mediation. If the Mediation Board is unable to achieve this result it may so advise the parties, terminate its mediatory services, and request that they arbitrate the dispute. Absent acceptance of that arbitration request or national emergency circumstances authorizing a national emergency board the federal intervention procedures are over, but the parties are not free to use their economic compulsions until 30 days after the Mediation Board has closed the case. At the end of that thirty days, the union is free to strike (or the employer to lock out).

This is a type of dispute termed a "major dispute" over which, at the end of the conferences and the mediatory efforts of the National Mediation Board, a strike can ensue.

The other, or "minor," type of dispute is that described in Section 3, First (i), of the Act, reading in its pertinent part as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the *interpretation or application*

> *of agreements* concerning rates of pay, rules, or working conditions, . . ., shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis supplied.)

In addition to the creation of the National Railroad Adjustment Board to arbitrate unresolved disputes over the interpretation or application of existing agreements between the carrier and its employees, Section 3, Second, of the Act authorizes the creation by the parties of special boards of adjustment with those same powers, as follows:

> "Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

It was this provision under which appellee and appellant acted in creating Special Board of Adjustment No.

434 (Finding of Fact XIII, R. 114) later to be referred to.

The distinctions between major and minor disputes under the Act are almost nowhere better set forth than in the decision of this court in *Butte, Anaconda & Pacific R. Co.* v. *B. of L.F.&E.*, 268 F.2d 54 (9 Cir. 1959), cert. den., 361 U.S. 864, 80 S. Ct. 124, 4 L. Ed. 2d 104 (1959), where at p. 58 it was said:

> "(1) At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 89 L. Ed. 1886, 16 LRRM 749, the difference between these two kinds of disputes was explained as follows:
>
> " 'The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. *They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*
>
> " '*The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.* The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. * * *'

"As to both kinds of dispute, the act requires that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help. Elgin, Joliet & Eastern Railway Co. v. Burley, supra, 325 U. S. at pages 725, 65 S. Ct. at page 1290, 16 LRRM 749. The Norris-LaGuardia Act prohibits the issuance of an injunction in a railway labor case involving a 'major dispute.' Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 42, 77 S. Ct. 635, 1 L. Ed. 2d 622, 39 LRRM 2578.

"In the case of minor disputes, if negotiation fails either party may submit the matter to the appropriate division of the National Railroad Adjustment Board. The awards of the several divisions of the Adjustment Board are final and binding. *Neither party is permitted to resort to self-help. A strike involving a so-called minor dispute is therefore to be enjoined.* Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra." (Emphasis supplied.)

B. This dispute was clearly a minor dispute under the Act.

Tested by any criteria set forth in the cases this dispute was, as the lower court stated, an unsettled "minor dispute" referable either to the National Railroad Adjustment Board or a special board of adjustment for binding decision as provided in Section 3.

The agreement to be applied, and over which the dispute arose, is Article II, Section 1, of the June 25, 1964, "White House Agreement" quoted at page 6 of this brief (R. 104). The history of this[5] and other provisions of the "work rules disputes" makes it clear that this agreement was arrived at on behalf of appellant's and appellee's designated agents as part of the entire national settlement of the national train consist and work rules disputes of 1959-60.

While both appellant and appellee were bound by the June 25, 1964, White House Agreement on "allowances away from home" and other "unresolved work rules" issues by the carriers' and brotherhoods' national representatives as firmly as if they had negotiated and executed the settlement locally—"on the property"—the fact is that as to each carrier and operating brotherhood it was a settlement as to all, but on a national basis.

On the issue of "suitable lodging away from home" or "an equitable allowance in lieu thereof" and what then happened to a pooled caboose allowance, the agreement of June 25, 1964, recognized that after its guidelines were set, details would still need to be worked out "on a local basis." Obviously, what is "suitable lodging" or an "equitable allowance in lieu thereof" will be one thing as to crews held away from home terminal in New York City, Miami, Florida, or San Francisco, California, and another thing in Keokuk, Iowa, Pasco, Washington, or Astoria, Oregon.

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[5] Cf. Rept., pp. 13-18, inclusive.

So the agreement, binding on both appellant and appellee, left it to them to work out how it was to be locally applied. And, as the court below correctly determined, this entire dispute involved only that issue. The agreement's deadline of 30 days after its effective date being upon it (July 25, 1964) and no local agreement having been reached, appellee on July 24, 1964, issued its Circular setting forth its concept of "suitable lodging" or an "equitable allowance in lieu thereof," and cutting off previous pooled caboose allowances as the agreement prescribed.

Not only were further negotiations on these issues not foreclosed by the issuance of the Circular, but the conduct of the parties establishes the fact. Two subsequent conferences were held between appellant and appellee, one on September 15, 1964 (R. 110), the last on January 27, 1965 (R. 113), in an attempt to reach final agreement on the application, on the appellee's property, of the June 25, 1964, agreement. Neither conference was successful, and the strike threat ultimately followed (R. 113, 114).

Appellant in its brief attempts, in its hope of trying the case *de novo* here and unlike any contention made below, to argue that the agreement of June 25, 1964, Article II, Section 1, was one thing, but that its "notice letter" of August 3, 1964, was unrelated to it and sought to promulgate a new and different rule. The court below correctly disposed of such an argument in his remarks quoted at page 13 of this brief. That he was correct is proved by the actions of appellant in its agreement of September 15, 1964, for that agreement spe-

cifically refers to the White House Agreement in this language (R. 110):

> "We hereby agree to the following in connection with *our dispute as to the interpretation of Section* 1, *Article II of the National Agreement dated June* 25, 1964:" (Emphasis supplied.)

Though that "interim" agreement is set forth in the Findings of Fact (R. 110), it is worthy of reproduction here:

"Mr. T. M. Delaney, General Chairman,
Order of Railway Conductors and Brakemen,
Vancouver, Washington

"Dear Mr. Delaney:

"We hereby agree to the following in connection with our dispute as to the interpretation of Section 1, Article II of the National Agreement dated June 25, 1964:

"Until we mutually agree otherwise, the status quo as of June 24, 1964, will be preserved with respect to those trainmen who are covered by the so called pooled caboose agreement dated April 10, 1958.

"The strike of employees whom you represent which has been sceduled for 7:00 AM, Wednesday, September 16, 1964, is hereby cancelled.

"Yours truly,

/s/ N. S. WESTERGARD
Vice President and
General Manager

"Agreed to:
/s/ T. M. DELANEY
General Chairman
Order of Railway Conductors
and Brakemen."

Much of what preceded, or followed, these facts as found by the court below are of relatively little consequence in the decision of the lower court or its affirmance here. For example, the National Mediation Board twice advised appellee (R. 108, 110) that it had been advised by appellant of the existence of a dispute in which its services were invoked; on both occasions it was advised in return by appellee (R. 108-109, 111-112) that the dispute was not one of NMB cognizance but was a "minor dispute" under the Railway Labor Act and the terms of the "White House Agreement" itself, and if unresolved was subject to the arbitral processes of the National Railroad Adjustment Board or a special board of adjustment under Section 3 of the Act. At no time has the National Mediation Board ever intervened in this dispute, whether by proffer of its services or otherwise. This fact has significance, it seems to appellee. The National Mediation Board is not to be charged, we think, with dereliction in carrying out its duties; rather, it seems clear, it must have agreed with appellee.

It must not be overlooked that Article VII of the White House Agreement of June 25, 1964, of itself provides that (R. 105).

> "Any disputes involving the interpretation or application of this agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act."

It may be questionable whether this language in

that agreement was necessary since the application of the provisions of the agreement, particularly in connections with the "Allowances Away From Home" disputes which might arise, would of necessity be resolved, if agreement of the parties proved impossible, by the procedures of Section 3 of the Act. However, lest there be doubt, that agreement itself provided the solution for these disputes. That is precisely what appellee did. To say that there is some deficiency in following the precise instructions of the agreement which produced this dispute in effecting its peaceful solution is not understandable.

Appellant has cited *Missouri-Illinois R. Co.* v. *ORC&B,* 322 F.2d 793 (CA 8, 1963).

The relevance of this citation is not apparent.

First, the carrier in that case did what the carrier here did not do, that is, it first impliedly if not expressly considered this a "major" dispute by acquiescing in the entry of the National Mediation Board through to the conclusion of its statutory procedures; not until then did the carrier attempt to make the dispute a "minor" one by submitting it to the arbitral processes of the National Railroad Adjustment Board as provided in Section 3 of the Act (cf. Column 1, 322 F.2d 797).

Here, however, appellee has never deviated from its position that this is a "minor" dispute and that the National Mediation Board for that reason had no part in this dispute (R. 108, 111), and in fact, as found by the court below (R. 113), the NMB has at no time intervened here as the Act would require it to do if this

were a "major" dispute. Unlike that in the *Missouri-Illinois* case, this controversy was not only submitted to the appropriate tribunal (whichever it might be) under Section 3 of the Act, but the NMB never intervened either prior to, or after, the two submissions.

Second, the decision in the *Missouri-Illinois* case was based on an entirely different national agreement than the "White House Agreement" here in issue, both in time and content. The *Missouri-Illinois* case involved a "national agreement" which by its terms allowed the creation of a new rule relating to the establishment of rates of pay for new assignments to be known as "road switchers," apparently not covered by the then existing agreements on the Missouri-Illinois property. Thus there was no national agreement to be interpreted on that property, as is the case here, but instead there was a national agreement looking to the creation of a new rule involving rates of pay and assignments on properties where such rates and assignments were nonexistent. This was without question properly the subject of a notice pursuant to Section 6 of the Act.

Rather than being authority *contra* the decision of the trial court here, therefore, the *Missouri-Illinois* case supports the basic principle to which we have adverted. All national agreements are not the same. That one left open the negotiation of a new rule. In *this* case, unlike the *Missouri-Illinois* case, the White House Agreement left to settlement of the parties only the *application and interpretation of an existing* rule (the White House Agreement) on expenses away from home, an equitable allowance in lieu thereof, and the fate of the

previous pooled caboose allowance thereupon. If agreement could not be reached, the "White House" solution itself provided for the arbitral process as its substitute —a far cry from the national agreement in the *Missouri-Illinois* case.

The distinction between the two cases is obvious. As the court there rightly said, a proper Section 6 notice seeks to *create* contractual rights for the future, cf. *Elgin, Joliet & Eastern R. Co.* v. *Burley,* 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 89 L. Ed. 1886, rather than *enforce present* contractual rights, which was exactly what the national agreement there involved left open to the parties. Here the contractual rights were *created* by the national agreement; their *application or interpretation* (enforcement) was the thing left to the parties, or to arbitration absent their agreement.

At the July 3 hearing in the court below appellant offered in evidence a letter from it to another railroad in another part of the country in some respects similar to its August 3, 1964, "notice letter" to appellant, and a reply from the National Mediation Board. Despite the fact that these letters were rejected in evidence (Tr. 76) they appear in the Appendix to appellant's brief without any notation that they were rejected below (Appellant's brief, pp. 33, 34, 41, 43). Something similar in the way of letter exchanges also appears in the Appendix to that brief (pp. 37, 39), though never proffered in evidence or even mentioned below, where such correspondence would undoubtedly have had the same fate. While this method of extracting comfort from some other carrier's problems seems

unusual indeed, it appears unlikely to be seriously regarded, on this appeal, as having any value, probative or otherwise. What is involved here is *this* dispute between *these* parties on *this* property. The National Mediation Board's view of the status of a dispute between appellant and other labor organizations on other railroads is not relevant to this case.

Lastly, whether this dispute was required to be submitted to the National Railroad Adjustment Board or to Special Board of Adjustment No. 434 has little to do with the lawfulness of a strike by appellant on this issue. There was—and is still— *a* dispute over the interpretation and application, on this property, of Section 1 of Article II of the agreement of June 25, 1964. Agreement failing, appellee submitted the dispute to Special Board of Adjustment No. 434, as it conceived its duty to be (R. 114). Appellant at the July 3 hearing objected that disputes could not be submitted to that body *ex parte,* that is, without mutual agreement (Tr. 35 et seq.) so on that same day appellee submitted the same dispute to the National Railroad Adjustment Board, First Division (R. 114, R. 56 et seq.), to which there is no question but that *ex parte* submission may come.[6] If appellant was right that under the agreement creating Special Board of Adjustment No. 434 disputes submitted to it *ex parte* cannot be decided by that body (Tr. 39), it will no doubt so rule. But in that event the very same dispute has been submitted to the First Division of the National Railroad Adjustment Board on the day

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[6] Section 3, First (i), quoted at page 15 of this brief, 45 U.S.C. § 153, First (i).

of the hearing below (R. 54, 56, 114), which by the Act[7] as well as the Supreme Court's pronouncement[8] may decide the dispute, whether by *ex parte* or joint submission. One place or the other, this dispute over the application of the agreement of June 25, 1964, will be decided, if agreement continues to elude the parties here.

C. The dispute being a "minor" one, "self-help" or a strike by appellant is unlawful.

A reading of appellant's brief discloses that it and appellee are not, apparently, far apart in their basic concept of the law, as the cases construe the Act. We both agree that "self-help"—strikes or lockouts—is denied where the dispute is a "minor" one, involving the interpretation or application of a written contract provision, or in railroad parlance an "existing rule" in a "schedule." It is equally clear that "self-help"—strikes or lockouts—is denied the parties even in a "major dispute" until all the mediatory requirements imposed on the National Mediation Board by Section 5 of the Act have been fulfilled. The injunction issued below was warranted on either basis; either this was a "minor" dispute, in respect of which arbitration, not a strike, is the only legal solution[9] or, if it was a "major" dispute, the "peaceful settlement" procedures of the Act had

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[7] Section 3, First (i).

[8] *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

[9] *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

not yet been completed and a strike could be lawfully enjoined without running afoul of the strictures of the Norris-LaGuardia Act.[10]

But of course this dispute was and is one involving only the interpretation or application of an existing agreement between appellant and appellee, Article II, Section 1, of the June 25, 1964, White House Agreement which, while committing both on a "national basis," bade them work out how it would be applied on a local basis. Appellee's Circular of July 24, 1964, and appellant's notice of August 3 of that same year exemplify only their conflicting views as to what was "suitable lodging" or an "equitable allowance in lieu thereof" under Article II, Section 1, of the White House Agreement.

III

An injunction is clearly warranted in this case.

Again, as in other aspects of its argument, appellant is not far away from appellee on the rules of law applicable to railway industry strikes or imminent strike threats. The argument, if any, comes simply over the application of these rules.

Somehow appellant attempts to argue that the restraints of the Norris-LaGuardia Act[11] precluded the court below from the issuance of a temporary injunc-

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[10] *Virginia Ry. Co.* v. *System Federation No.* 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952); *American Airlines, Inc.* v. *Air Line Pilots,* 169 F. Supp. 777 (D.C. S.D. N.Y. 1958).

[11] 29 U.S.C. § 101-115, 47 Stat. 70.

tion, apparently because appellant seeks to make the dispute over the *application* of Article II, Section 1, of the June 25, 1964, agreement something different from the agreement itself. This is of course a meaningless quibble.

And even if it were not a complete and deliberate misconception of the facts in this case, appellant's position would be erroneous. It is too well settled to stand much citation here that "self-help" may not be resorted to in "minor disputes" under the Act.[12]. There has been no deviation from this rule in any of the courts since the *Chicago River* case was handed down in 1957; it is inherent as well as expressly stated in that decision that the Norris-LaGuardia Act has no application to cases involving minor disputes such as the one presently before this Court.

It is crystal clear from the very beginning of the handling, on a national basis, of the 1959-1960 national work rules disputes, through every type of known commission and some novel ones, through the Congress respecting the engine and train manning issues, and at the White House on the unresolved work rules disputes, that national policy required the peaceful settlement, without strikes, of all aspects of those disputes. There can be no valid contention that the dispute here involved, and submitted to either or both appropriate tribunals under Section 3 of the Act, was not a part of that national handling and its final resolution. The ap-

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[12] *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

plication of the "White House Agreement" on the issue here in dispute necessarily had to be handled on a local basis. However, this did not open the door to strike action.

Indeed, it is unthinkable that this dispute, which is such an integral part of the national handling of all disputes on a nonstrike basis, could suddenly become a strikeable issue. If this were so, the application and interpretation of every other agreement reached over these long and trying years is also subject at all times to strike action. This clearly would subvert both the policy of the Act and the mandatory procedures applicable to "minor disputes" under Section 3. The court below simply implemented the law and also the policy behind the settlement of all such disputes, including this one.

It is well established that the procedures of the Act are mandatory, that even in "major disputes" (which this is not) self-help may not be resorted to until all these procedures have been exhausted, and that the district courts have jurisdiction and power to issue necessary injunctive orders to enforce compliance notwithstanding the provisions of the Norris-LaGuardia Act.[13]

As the court below found, this dispute is a minor one and has been submitted to Special Board of Adjustment No. 434 and the National Railroad Adjustment

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[13] *Virginia Ry. Co.* v. *System Federation No.* 40, 300 U.S. 515, 563, 57 S. Ct. 592, 607, 81 L. Ed. 789 (1937); *B. of R.T.* v. *Howard,* 343 U.S. 768, 774, 72 S. Ct. 1022, 1025, 96 L. Ed. 1283 (1952); *American Airlines Inc.* v. *Air Line Pilots,* 169 F. Supp. 777, 787 (D.C. S.D. N.Y. 1958); *cf. Pa. R.R. Co.* v. *Transport Workers,* 202 F. Supp. 134 (D.C. E.D. Pa. 1962).

Board, First Division (R. 114), for the purpose of resolving the parties' difficulties over the application of the June 25, 1964, agreement on the point here disputed. As that court also found, the National Mediation Board has not taken any of the actions required of it by Section 5 of the Act (R. 113). On either basis, therefore, the temporary injunction below was rightly issued and the judgment below should be affirmed. It should be affirmed, however, on the correct basis concluded by the court below, that the dispute was—and is—a "minor dispute" and as such subject to resolution under Section 3 of the Railway Labor Act and not by self-help on the part of either party.

CONCLUSION

The unobjected-to Findings of Fact entered by the court below amply support its Conclusions of Law that the dispute here involved is a "minor dispute" over the application and interpretation of the June 25, 1964, "White House Agreement" on this property and that since it has been submitted for adjudication to an appropriate tribunal under Section 3 of the Act, a strike by appellant ORC&B to compel agreement on such a dispute is unlawful and enjoinable.

Respectfully submitted,

DAVIES, BIGGS, STRAYER, STOEL AND BOLEY
HUGH L. BIGGS
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES P. ROGERS
Of Attorneys for Appellees

APPENDIX I

THE UNITED STATES DISTRICT COURT
FOR THE DISRICT OF OREGON

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, A Washington corporation, OREGON TRUNK RAILWAY, a Washington corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation, Plaintiffs, vs. ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association. T. M. DELANEY, individually and as General Chairman, LEO HOLZSCHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairmen, *Defendants.*	Civil No. 65-278 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly to be heard before the undersigned Judge of the above-entitled court on July 3, 1965. Plaintiffs appeared by their attorneys Hugh L. Biggs, Garry R. Bullard, and James P. Rogers. Defendants appeared by their attorneys Clifford D. O'Brien and Harry J. Wilmarth.

Based upon the pleadings and exhibits herein, and the arguments of counsel, the Court being fully advised therefrom hereby makes and enters the following

FINDINGS OF FACT

I

Plaintiff Spokane, Portland & Seattle Railway Com-

pany is a corporation organized and existing under the laws of the State of Washington with its general offices at Portland, Oregon, and is a common carrier engaged in interstate commerce by railroad and is a carrier within the meaning of that term as defined in the Railway Labor Act, and is subject to the provisions of that Act and to the Interstate Commerce Act. Plaintiff Oregon Trunk Railway is a corporation organized and existing under the laws of the State of Washington with its general offices in Portland, Oregon, and is a wholly owned subsidiary corporation of Plaintiff Spokane, Portland & Seattle Railway Company. Plaintiff Oregon Electric Railway Company is a corporation organized and existing under the laws of the State of Oregon with its general offices in Portland, Oregon, and is a wholly owned subsidiary corporation of plaintiff Spokane, Portland & Seattle Railway Company. The plaintiffs enter into collective bargaining agreements with representatives of employees under the Railway Labor Act (45 U.S.C., Secs. 151 et seq.) as a common entity known as the "SP&S Railway Company System Lines." When used herein, the word "plaintiffs" shall mean "SP&S Railway Company System Lines."

II

Plaintiffs own and operate a railroad system of over 935 miles in interstate and intrastate commerce, with main lines in and servicing the States of Washington and Oregon from Portland, Oregon, to Spokane, Washington, and subsidiary or branch lines of railroad in the States of Washington and Oregon encompassing the mileage above stated. Plaintiffs are an integral part of the na-

tionwide railway systems of the United States and connect and interchange freight and passengers with numerous other railroads at many points in the states in which they operate. Plaintiffs carry mail for the United States and continually transport United States military personnel and quantities of national defense material. Plaintiffs serve directly scores of industrial plants and business enterprises, and transport in excess of 25,000 tons of freight and 375 passengers each working day. They have an investment in railroad rolling stock, equipment, and physical property of approximately $148,000,000, and employ approximately 2,500 persons.

III

Defendant Order of Railway Conductors and Brakemen, hereafter sometimes referred to as "ORC&B," is a voluntary unincorporated association and a labor organization national in scope with offices in various parts of the United States including Vancouver, Washington. Said association is subject to the Railway Labor Act, and at all times material herein has been and is the recognized and acting collective bargaining agent, pursuant to the aforesaid Act, for certain of plaintiffs' employees of the classes and crafts known as conductors and brakemen. Defendant T. M. Delaney is the General Chairman of said organization on plaintiffs' lines, and defendants Holzschuh, Jones, Budahl, and Meistrell are Local Chairmen on various portions of plaintiffs' lines. All of said defendants personally named herein are authorized to and do represent said association in dealings with plaintiffs concerning the subjects encompassed by the

Railway Labor Act above cited, and represent plaintiffs' employees in the crafts and classes above described.

IV

Rates of pay, rules, and working conditions of conductors and brakemen on the plaintiffs' property are presently set forth in and governed by the provisions of collective bargaining agreements and subsequent amendments, including those herein described, between plaintiffs and ORC&B. Plaintiffs have duly performed all the terms and conditions contained in each agreement on their part to be performed and are ready, willing, and able to continue to do so.

V

On or about July 14, 1952, plaintiffs and defendant ORC&B entered into an agreement, designated as "Appendix E" to the collective bargaining agreement between plaintiffs and defendant ORC&B, relating to the pooling of cabooses. Paragraph (c)(1) of said agreement, designated Article 7 of said "Appendix E," provides:

> "(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman of such intention, specifying the territory and service involved, whereupon the carrier and employee representatives shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses."

Pursuant to the above-quoted provisions plaintiffs elect-

ed to pool cabooses and, on or about April 10, 1958, entered into an agreement with defendant ORC&B which in part provided as follows:

"4. When trainmen in pool and unassigned freight service are provided with pooled cabooses, their basic rate will be increased one cent (1¢) per mile in addition to the established basic through freight rate. This to apply to mileage claimed and paid for as per time slip.

"It is understood that the one cent (1¢) per mile applicable to pool and unassigned freight service will also apply to pool and unassigned freight crews when required to perform unassigned way freight, or paid the way freight rate under the Conversion Rule, or when required to perform unassigned work train or unassigned snow service, in addition to the existing rates applicable to such service.

"5. Train crews to whom this agreement is applicable, if tied up between terminals where there are no accommodations to eat or sleep, will be paid continuous time at the pro rata rate while so tied up.

"6. This agreement is without prejudice or precedent to any other practice heretofore recognized and agreed upon by the Carrier and the Organization, but supersedes any conflict arising therefrom."

Following this agreement pool caboose assignments were established by plaintiffs in certain territories on its system and the mileage allowances were paid in accordance with said agreement.

VI

On June 25, 1964, an agreement was entered into between certain carriers, including plaintiffs, represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and employees of such carriers represented by the ORC&B and other railway operating organizations, in disposition of certain portions of the carriers' notices of November 2, 1959, and the organizations' notices of September 7, 1960. Said notices included an issue relating, among other things, to proposals by the national operating organizations of employees for lodging and meals when away from home terminal or allowances in lieu thereof. After disposition under Public Law 88-108 of the "firemen on diesel" and "train manning" issues, the remaining issues were disposed of by the National Agreement of June 25, 1964, Article II, Section 1 of which provided:

"ARTICLE II—EXPENSES AWAY FROM HOME:

"Section 1—

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an

equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement."

In addition, said Agreement in Article VII provides:

"ARTICLE VII—SETTLEMENT OF DISPUTES:

"Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act."

VII

In conference with representatives of defendant ORC&B on June 18, 1964, and again on July 13 and July 21, 1964, plaintiffs notified said representatives of defendant ORC&B that effective July 25, 1964, and in accordance with the agreement of June 25, 1964, it would provide suitable lodging at the carriers' expense or an adequate allowance in lieu thereof and was discontinuing the mileage allowance in lieu of the lodging al-

lowance provided under the pooled caboose agreements above set forth. On July 24, 1964, plaintiffs promulgated Circular No. 65, reading as follows:

"Circular No. 65

"ALL CONCERNED:

"Effective July 25, 1964 and until further notice, whenever a road service crew is tied up at a terminal other than the designated home terminal of the crew assigned for four hours or more, each member of the crew so tied up will be provided lodging at the following locations:

Spokane—Coeur d'Alene Hotel
Pasco—Pioneer Hotel
Wishram—SPS Hotel
Bend—Colonial Hotel
Albany—Albany Hotel
Eugene—Lane Hotel
Astoria—Astor Hotel
Seaside—Chillquist Rooming House
Vernonia—Hy-van Hotel

"A survey recently taken of lodging then being used by train and enginemen at the above points indicated that while some were using accommodations listed above, others had made different lodging arrangements. Therefore, although accommodations will be available at the above-named establishments, if any crew member desires to keep his present arrangement, he may do so in which event he will be allowed $1.50 for each layover period during which he is tied up for more than four hours at the away-from-home terminal of his assignment. This allowance may be claimed on the service slip for the particular trip.

"While the above arrangement is in effect, the allowance in lieu of lodging presently being made to certain train crew members in pooled caboose territory will be removed."

VIII

By letter dated August 3, 1964, Defendant T. M. Delaney on behalf of the ORC&B sent to plaintiffs a notice reading as follows:

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

"(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

"(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth miles from point where crews are required to register and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call service will be provided by carrier.

"(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance

per trip will be six dollars ($6.00) to be paid by check separate and apart from wages and earnings.

"Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act."

On August 10, 1964, plaintiffs advised defendant T. M. Delaney and defendant ORC&B of its disagreement with the effectiveness, pursuant to Section 6 of the Railway Labor Act, of the ORC&B notice of August 3, 1964, by letter reading as follows:

"This will acknowledge your letter of August 3 in which you state that 'our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof'. You then proposed an agreement be reached in accord with Section 6 of the Railway Labor Act which would embody your interpretation of the terms 'suitable lodging' and 'equitable allowance'.

"It is my position that your notice of August 3 is improper in view of Article VII of the agreement of June 25, 1964, reading—

" 'Any dispute involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other provisions of Section 3 of the Railway Labor Act.'

which makes your so-called notice under the Railway Labor Act not only improper but a specific violation of the Agreement.

"Your attention is also directed to Item 4 on page 4 of the 'Settlement and Determination of the Mediators' with respect to the National Agreement which reads in part—

> " 'We note, however, that this is a negotiated Agreement voluntarily entered into and therefore is a responsibility on the Parties in respect to their own interest and that of the Public to view the Agreement as having established a relationship as concerns the issues included for at least the ensuing two years.'

which is evidence that such a notice will continue to be improper for the two-year period to which the Mediators refer.

"We already have a conference scheduled for 10:00 a.m., Thursday, August 13, on another matter and possibly we could further discuss Article II of the June 25, 1964, Agreement during that conference."

IX

On August 20, 1964, the National Mediation Board sent the following telegraphic message to plaintiffs:

"H. J. Tierney, Chief of Personnel
Spokane, Portland and Seattle Railway Co.,
Portland, Org.

"Following wire received from ORC&B 'SP&S Railway has unilaterally and illegally abrogated agreement effective 4-15-58 thereby effecting a wage cut of $30 to $50 a month to employees represented by this organization. Mediation is hereby invoked. You are requested to direct this carrier to restore wages provided under this agreement and maintain status quo pending mediation and further proceedings as provided by Section 5 of the Railway Labor Act.

Unless we are promptly notified carrier has restored wages of these employees a withdrawal from service will be authorized.' Please wire statement.

"Thomas A. Tracy, Exec. Secy., NMB."

In response thereto plaintiffs sent the following telegram dated August 21, 1964, to the National Mediation Board:

"Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C.

"Your telegram 20th. On July 25, 1964 Carrier began furnishing lodging facilities to train and engine crews under the terms of Article II, Section 1, of the National Agreement of June 25, 1964.

"To train crew members covered by the Pooling Cabooses Agreement dated April 10, 1958, that portion of said Agreement providing for an allowance in lieu of lodging was removed in accordance with that portion of Article II, Section 1, of the National Agreement of June 25, 1964 reading:

" 'If an allowance is made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied or offset against an equivalent allowance. . . .'

"When several conferences failed to resolve the disputes which arose from this handling, the Carrier requested the Organization to join them in handling the issues in accordance with terms of Article VII of the National Agreement of June 25, 1964.

"The next development was receipt of the information contained in your wire of August 20, 1964, which was received while Carrier was in conference with the General Chairman of the ORC&B discussing the issues with which that telegram concerned itself.

"During this conference Agreement was reached with ORC&B that status quo conditions existent July 24, 1964 concerning Article II, Section 1, of the National Agreement of June 25, 1964 and the effect of that Article on the Pooling Cabooses Agreement dated April 10, 1958 would be restored pending further local negotiations on the property and that such status quo would remain in effect so long as efforts to resolve the disputed areas were being made in consonance with the terms of the National Agreement of June 25, 1964.

"Conference for this purpose has been scheduled commencing Monday, August 24, 1964.

"N. S. WESTERGARD
Vice President & General Mgr.
SP&S Railway Company."

No further action was taken by the National Mediation Board in connection with the ORC&B notice described in the telegram of August 20 herein set forth until its telegram to plaintiffs of November 12, 1964, hereafter set forth.

X

On September 15, 1964, the International President of defendant ORC&B, G. N. Harris, sent a telegram to defendant T. M. Delaney, which read as follows:

"Is your authority to withdraw from the service

of the SP&S employees represented by this organization at 8:00 AM Wednesday September 16 1964, due to the carrier's refusal to restore the special allowance provided for in your pooling caboose agreement pending settlement of the dispute emanating from the application of Article II Section 1 of the June 25 1964 agreement."

On the same day plaintiffs through N. S. Westergard, their Vice President and General Manager, and defendant T. M. Delaney met in conference in Portland, Oregon, and reached an agreement reading as follows:

"Mr. T. M. Delaney, General Chairman,
Order of Railway Conductors and Brakemen,
Vancouver, Washington

"Dear Mr. Delaney:

"We hereby agree to the following in connection with our dispute as to the interpretation of Section 1, Article II of the National Agreement dated June 25, 1964:

"Until we mutually agree otherwise, the status quo as of July 24, 1964, will be preserved with respect to those trainmen who are covered by the so called pooled caboose agreement dated April 10, 1958.

"The strike of employees whom you represent which has been scheduled for 7:00 AM, Wednesday, September 16, 1964, is hereby cancelled.

"Yours truly,

/s/ N. S. WESTERGARD
Vice President and
General Manager

"Agreed to:
/s/ T. M. DELANEY
General Chairman
Order of Railway Conductors
and Brakemen"

XI

On November 12, 1964, plaintiffs received a telegram from the National Mediation Board, which read as follows:

"N. S. Westergard

"Have received following telegraphic application from ORC&B this date — ' — Account the Spokane, Portland & Seattle Railway's refusal to negotiate on Organization's Section 6 notice dated August 3rd, 1964 requesting an agreement for suitable lodging or an equitable allowance in lieu thereof for employees represented by the Order of Railway Conductors & Brakemen mediation is hereby invoked.' Request any statement you may care to make regarding this application.

"THOMAS A. TRACY, Exec. Secy., NMB."

In response to the National Mediation Board's foregoing-stated request for the position of plaintiffs, plaintiffs replied by letter dated November 16, 1964, which reads as follows:

"Mr. Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C.

"Dear Mr. Tracy:

"Referring to your telegram of November 12, advis-

ing that your Board is in receipt of an application for mediation from the Order of Railway Conductors and Brakemen covering a dispute between that organization and this Company on the following subject, and requesting a statement in behalf of the Company:

> " 'Organization's Section 6 notice of August 3, 1964 requesting adoption of certain rules governing lodging facilities.'

"This dispute has to do with application of Section 1 of Article II—Expenses Away From Home—of the Agreement of June 25, 1964 between carriers represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and their employees represented by the five operating organizations. Such provision reads as follows:

> " 'When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.
>
> " 'If an allowance is being made in lieu of lodging as well as other considerations under pro-

visions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

" 'The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.'

"The June 25, 1964 Agreement also contains Article VII—Settlement of Disputes—which reads as follows:

" 'Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.'

"Notwithstanding the fact that the 'suitable lodging' dispute was disposed of by Article II, Section 1, in the then tentative agreement which was officially ratified by the unions to become effective three days later, or June 25, 1964, and the further fact that the June 25, 1964, Agreement, in Article VII thereof quoted above, contained a required procedure for the settlement of any disputes involving interpretation or application of that Agreement, including Article II, Section 1, ORC&B General Chairman Delaney, on August 3, 1964 served the purported Section 6 notice which is the subject of the organization's invocation to which your letter refers, in clear violation of Article VII of the Agreement and, consequently, of the Railway Labor Act.

"Meantime, the undersigned has been meeting not

only with ORCB General Chairman Delaney but the Chairman of BLE and BLF&E as well in an attempt to reach a mutually satisfactory interpretation of the language appearing in Section 1 of Article II—'Expenses Away From Home' of the June 25, 1964 National Agreement. Although no written agreement has yet been signed disposing of this matter with any of the three Chairmen, we have reached tentative agreement with BLE and BLF&E and hope to have the agreement signed this week.

"Insofar as ORC&B is concerned, in my letter October 23, file 1150-a, to Mr. Delaney, a conference date was suggested for November 10 to further discuss the matter of suitable lodging under Section 1 of Article II cited above, but Mr. Delaney failed to appear for conference.

"It is urgently requested that, on the clear basis of the impropriety and illegality of the organization's purported Section 6 notice, and the equally clear procedure which must be followed for the settlement of disputes involving interpretation or application of the provisions of the June 25, 1964 Agreement, the National Mediation Board reject the organization's application for its mediatory services, and that it point out to the organization that, if it is unable to resolve the controversy on the property, the proper and only avenue for adjudication is specified in Article VII of that Agreement.

"Very truly yours,

/s/ N. S. WESTERGARD
Vice President and
General Manager"

From November 16, 1964, to the present time the National Mediation Board has taken none of the actions required of it by Section 5 of the Railway Labor Act, as amended (45 U.S.C. Section 154) when there is involved between carriers and labor organizations the type of rule changes described by Section 6 of that Act.

On November 25 and November 27, 1964, agreements were reached between plaintiffs and the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers, respectively, implementing Article II, Section 1, of the June 25, 1964, agreement respecting suitable lodging or an equitable allowance in lieu thereof. On January 27, 1965, plaintiffs' representatives met with defendant T. M. Delaney and G. P. Lechner, International Vice President of defendant ORC&B, in an unsuccessful attempt to resolve their differences under the same provision of the June 25, 1964, agreement. No further conferences have been held between plaintiffs and defendant ORC&B on the subject.

XII

On June 2, 1965, plaintiffs received a telegram from the National Mediation Board reading as follows:

"N. S. Westergard, VP & GM
Spokane Portland & Seattle Railway Co
Portland Org

"Following telegram has been received from G. H. Harris, President, ORC&B. Quote Account of Carrier's refusal to bargain realistically on our Section 6 notice of August 3, 1964, this is your authority to withdraw from service, employees of the Spokane,

Portland, and Seattle Railway represented by this organization at 6:00 AM June 7, 1965 unquote. Please advise return wire subject this dispute and present status.

"THOMAS A. TRACY, Executive Secretary
National Mediation Board"

In railroad parlance a reference to a withdrawal from service is equivalent to a statement of intention to strike.

On June 4, 1965, conference was held between H. J. Tierney, Chief of Personnel of the plaintiffs, and defendant T. M. Delaney, during which conference defendant Delaney advised plaintiffs through H. J. Tierney that defendant ORC&B would strike plaintiffs commencing at 6:00 a.m. June 7, 1965.

XIII

Pursuant to Section 3 SECOND of the Railway Labor Act plaintiffs and defendant ORC&B had, by agreement dated October 20, 1961, established a special board of adjustment known as "SP&S Ry.-ORC&B Special Board of Adjustment No. 434." Subsequent to the agreement establishing such Board plaintiffs and defendant ORC&B had submitted to such Board all unresolved disputes between them arising prior to the present dispute. All disputes so submitted to Special Board of Adjustment No. 434 had been submitted by mutual agreement. On June 3, 1965, plaintiffs submitted to such Special Board of Adjustment the dispute between it and defendant ORC&B concerning the application and implementation of Article II, Section 1, of the June 25, 1964, agreement, without the consent of defendant

ORC&B, known in railway parlance as an "*ex parte* submission." Defendant ORC&B objected to such submission on the ground that Special Board of Adjustment No. 434 had jurisdiction to hear and determine only such disputes as were submitted by mutual agreement, and so advised the Chairman thereof.

On July 3, 1965, plaintiffs submitted said dispute to the National Railroad Adjustment Board, First Division, but did not recede from its position that said dispute was properly before Special Board of Adjustment No. 434.

XIV

Defendants have not withdrawn the strike notice of June 3, 1965. A strike against plaintiffs by defendants would shut down all of plaintiffs' operations by rail in the States of Washington and Oregon and would cause irreparable injury to plaintiffs, other railroads with which it connects, shippers on plaintiffs' lines and other lines with which it connects, and cause the lay-off of approximately 2,500 employees not involved in the dispute between plaintiffs and defendant ORC&B. Plaintiffs are without adequate remedy at law.

Based upon the pleadings, exhibits, findings of fact, and opinion herein, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the action and of the parties hereto.

2. The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.), and as such is properly referable to an appropriate tribunal under Section 3 of that Act for adjudication of such disputes, in the event the parties are unable to reach agreement thereon.

3. A strike by defendant ORC&B to compel agreement on said dispute is unlawful and enjoinable.

4. Plaintiffs are entitled to a temporary injunction in this cause restraining and preventing defendants from striking or otherwise interfering with plaintiffs' operations over the interpretation or application of Article II, Section 1, of the agreement of June 25, 1964, until the final order of this Court.

Done at Portland, Oregon, this 3rd day of August, 1965.

WILLIAM G. EAST
District Judge

Approved as to form July 27, 1965.

CLIFFORD D. O'BRIEN
Of Attorneys for Defendants